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In The
SUPREME COURT OF THE UNITED STATES

October Term 1998

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COY LYNN OWENS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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On petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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CLOUD H. MILLER, III
52 Executive Park South
Suite 5203
Atlanta, GA 30329
404-633-3797
800-992-0832

## QUESTION PRESENTED

I. The United States Court of Appeals for the Fifth Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court and other United States Court of Appeals decisions, and has departed from the accepted and usual course of judicial proceedings, thereby calling for the exercise of the Supreme Court's supervisory power.

## LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Court of Appeals for the Fifth Circuit.

1. **COY LYNN OWENS,**
Defendant/Appellant/Petitioner;

2. **UNITED STATES OF AMERICA,**
Plaintiff/Appellee/Respondent.

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## OPINIONS BELOW

As to the denial of Petitioner's Petition For Rehearing, there are no other reports or opinions, other than the Fifth Circuit's Opinion, which can be found in the Appendix, beginning at App.2.

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## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 4, 1998. The Petitioner filed a timely Petition for Rehearing which was denied on September 30, 1998. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

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## CONSTITUTIONAL STATUTORY AND RULE PROVISIONS INVOLVED

In pertinent part the general rule is that, a claim of inadequate representation must be presented under the provision of this Honorable Court's decision in **Strickland v. Washington**, 466 U.S. 668 (1994). A defendant must demonstrate that there is reasonable probability, but for the defendant's attorney's unprofessional errors, the disposition of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. Id. at 694. The Fifth and Sixth Amendment's constitutional guarantees and protections, and in accordance with Title 18 U.S.C. § 3481, provides for in pertinent part, "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...." Fifth Amendment; "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." Sixth Amendment. Title 18 U.S.C. § 3481 provides that a defendant has the right to testify in his own behalf, "In trial of all persons charged with the commission of offenses against the United States...the person charged shall, at his own request, be a competent witness."

The Supreme Court established a two-prong test to evaluate ineffective assistance of counsel claims. The Court in **Strickland v. Washington**, 466 U.S. 668 (1984), stated that, "...the purpose of effective assistance guarantee of the Sixth Amendment ... to insure that criminal defendants receive a fair trial. Id. at 689. **Strickland** further states, that a court must:

> ...judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. at 690. Also see **Kyles v. Whitley**, 5 F.3d 806 (5th Cir. 1993) rev'd on other grounds, 115 S.Ct. 1555 (1995), and **United States v. Pofahl**, 990F.2d 1456, 1470 (5th Cir. 1993).

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## STATEMENT OF THE CASE

Petitioner was charged on February 7, 1996, by a federal grand jury in the Eastern District of Texas, in a nine count indictment, Counts 1 and 5 of the indictment charged violations of Title 18 U.S.C. § 371, conspiracy to commit fraud by mail; Counts 2,3,6,7 and 8 charged

violations of Title 18 U.S.C. §§ 1341 and 2, fraud by mail, aiding and abetting, and Counts 4 and 9 charged violations of Title 18 U.S.C. §§ 844(h) and 2, use of fire to commit a felony, aiding and abetting. Petitioner previously was indicted in an eight count indictment in January, 1994, which was dismissed without prejudice at the request of the Government.

Petitioner was arrested on February 22, 1996, taken into custody and released on personal recognizance bond. On February 22, 1996, Petitioner was arraigned on the indictment charges, and entered pleas of not guilty as to each count. Petitioner retained counsel Eldred Harmon who represented Petitioner during trial, which began on October 7, 1996, and ended on October 9, 1996, with the jury finding Petitioner guilty on all counts of the indictment. Petitioner requested Harmon and co-counsel Orlando Hernando to withdraw and substituted new counsel for sentencing. Petitioner contended in his pro se motion for substitution of counsel, that Harmon and Hernando provided ineffective assistance. The District Court granted substitution of counsel. Petitioner filed a motion for a new trial which was denied on November 26, 1996, through new counsel. The motion for new trial claimed in part, that his trial counsel Harmon and Hernando were ineffective and prohibited the Petitioner from testifying in his own behalf at trial. Attached to the motion for new trial, lead trial counsel Harmon filed an affidavit averring that he failed to prepare adequately for trial, and that he prohibited Petitioner from testifying in his own behalf. The government filed a response to Petitioner's motion for new trial and on December 20, 1996, the district court entered its order denying Petitioner's motion, holding that Petitioner's claims of ineffective assistance of trial counsel and counsel's refusal to allow Petitioner to testify at trial

were not "newly discovered" evidence and was untimely. Petitioner filed a notice of interlocutory appeal to the Fifth Circuit Court of Appeals on December 30, 1996. This petition was not resolved. On June 27, 1997, the government requested an evidentiary hearing concerning Petitioner's claim of ineffective assistance of trial counsel prior to the district court's imposition of sentence. The district court granted the evidentiary hearing on the issue of ineffective assistance of counsel. On August 14, 1997, an evidentiary hearing was conducted by the district court and Petitioner's trial counsel(s) testified along with other witnesses including Petitioner. Petitioner's trial counsel Harmon testified, that he provided ineffective assistance of counsel by his failure to properly prepare for trial, and that he prohibited Petitioner an opportunity to testify in his own behalf. Hernando, Petitioner's co-counsel testified, that he believed that he had provided effective assistance of counsel as guaranteed by "*the Seventh Amendment*" to the Constitution, and that he was unaware of any prohibition by lead counsel Harmon to deny Petitioner's right to testify during trial.

Petitioner on August 18, 1997, appeared before the district court for sentencing, at which time the district court made its finding of fact for the record, that Petitioner's lead trial counsel Harmon's testimony during the evidentiary hearing on August 14, 1997, was not credible, and would not be considered for purposes of a new trial and further, that co-counsel Hernando's testimony was credible and would be given weight by the court.

Petitioner was sentenced to a total aggregate term of 210 months imprisonment, restitution in the amount of $169,271.96, an assessment of $450.00, and a three year term of supervised release. A timely notice of appeal was

filed with the Fifth Circuit Court of Appeals and briefs were prepared and filed by the Petitioner and the Government. Upon consideration the Fifth Circuit Court of Appeals entered its finding PER CURIAM: AFFIRMED.

The issues on appeal presented to the Fifth Circuit were:

I. WHETHER THE DISTRICT COURT ERRED, ABUSING ITS DISCRETION WHEN IT DENIED OWENS' MOTION TO DISMISS SECOND INDICTMENT FEDERAL RULE OF CRIMINAL PROCEDURE, RULE 12(b), WHERE THE GOVERNMENT AND DISTRICT COURT VIOLATED FEDERAL RULE OF CRIMINAL PROCEDURE, RULE 48(a), DISMISSAL AND LOCAL RULE CR-47(e), TIME TO FILE SUPPORTING DOCUMENTS AND BRIEF, HOLDING THAT OWENS FAILED TO OVERCOME THE PRESUMPTION OF GOOD FAITH NOR DID HE SHOW THAT HE WAS PREJUDICED.

II. WHETHER THE DISTRICT COURT ERRED, WHEN IT HELD THAT OWENS' ATTORNEY WAS NOT INEFFECTIVE AND THAT HE WAS NOT DENIED HIS SIXTH AMENDMENT TO EFFECTIVE ASSISTANCE OF COUNSEL, WHERE COUNSEL ADMITTED POST-CONVICTION THAT HE WAS INEFFECTIVE AND

PROHIBITED OWENS FROM TESTIFYING DURING TRIAL UPON REQUEST TO DO SO.

III. WHETHER THE DISTRICT COURT ERRED, WHEN IT DENIED OWENS' MOTION FOR RECUSAL, §455(a), (b)(1), IN RECOGNITION OF PROSECUTORIAL MISCONDUCT, WHERE THE GOVERNMENT ALLEGEDLY EX PARTE CONFERRED WITH THE DISTRICT COURT REGARDING REPROSECUTION.

IV. WHETHER THE DISTRICT COURT ERRED, BY FAILING TO FOLLOW FRCP RULE 32(c)(3)(D) TO RESOLVE PSR ISSUES IN DISPUTE AND FAILED TO ADDRESS OF OWENS' ABILITY TO PAY RESTITUTION PURSUANT TO U.S.S.G.§5E1.1 AND TITLE 18 U.S.C. §3663(b).

Petitioner filed a motion for rehearing to the Fifth Circuit Court of Appeals, which was denied on September 30, 1998. Petitioner contends, that the appellate court in this case erred, when it denied Petitioner's appellate issue regarding his argument that he received ineffective assistance of counsel, and that Petitioner met the criteria as articulated by this Honorable Court's standard in **Strickland v. Washington**. The Fifth Circuit Court of Appeals affirmed the district court's denial of Petitioner's motion for a new trial, which was based upon the claim in pertinent part, that lead trial counsel's admitted by affidavit and in testimony that he was ineffective in his

representation, and further prohibited Petitioner from testifying in his own behalf. The district court found that lead counsel's testimony was not credible, but rather relied upon co-counsel's assertion that he believed that Petitioner received effective assistance of counsel in compliance with the "*Seventh Amendment*" to the Constitution, and further Petitioner was not prohibited from testifying during trial in his own behalf., Petitioner's lead counsel admitted by way of affidavit dated November 8, 1996, that he was ineffective where, "In preparation for trial of the aforementioned matter, I failed to prepare adequately due to relying upon the numerous motions filed in this matter, including, but not limited to, the motion to dismiss indictment which was subsequently surprisingly denied...Moreover, during the trial I prohibited Mr. Owens from testifying in his defense and failed to take into account that this should have been his own decision, made voluntarily, and without duress."

The Fifth Circuit in rendering its opinion regarding Petitioner's appellate Issue II on September 4, 1998, affirmed the district court's denial of Petitioner's motion for new trial, based upon in relevant part ineffective assistance of counsel, the failure to prepare for trial, and present a defense, and the prohibition of Petitioner's right to testify in his own behalf. In reaching its decision the Fifth Circuit held, "Coy Lynn Owens appeals his convictions and sentence. Having considered the record and the brief, and finding neither error or abuse of discretion, the convictions and sentence are AFFIRMED." [See Appendix].

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## ARGUMENT

**A. The United States Court of Appeals for the Fifth Circuit has rendered a decision that is in conflict with the decisions of the United States Supreme Court and other United States Courts of Appeals, and has departed from the accepted standard addressing ineffective assistance of counsel, thereby calling for the exercise of the Supreme Court's supervisory power.**

Petitioner asserts, that the Fifth Circuit Court of Appeals erred, as did the district court by failing to apply the **Strickland v. Washington** standard assessment of ineffective assistance of counsel in the criminal prosecution of Petitioner, where Petitioner established through lead trial counsel's testimony and affidavit, (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable and fundamentally unfair outcome of the proceeding.

Petitioner propositions that the Fifth Circuit erred, as did the district court by failing to apply the **Strickland** standard with respect to ineffective assistance of counsel, where lead counsel testified under oath during an evidentiary hearing that he did not properly prepare for trial, relying only on a motion to dismiss the indictment based upon a violation of FRCP Rule 48(a), where he did not present a defense, or provide an opportunity for Petitioner to testify in his own behalf, upon request to do so.

The Fifth Circuit Court's finding that the district court did not error in its conclusion that lead counsel's evidentiary hearing testimony and affidavit regarding his ineffective assistance admissions were not credible, and that co-counsel's testimony, that Petitioner received effective assistance of counsel in conformance with the "*Seventh* Amendment" to the Constitution, and further that he was not aware that Petitioner wanted to or was denied his right to testify in his own behalf was credible, was error and contrary to the **Strickland**, standard. Also see **United States v. Cronic**, 466 U.S. 648 (1984) (if counsel "...entirely fails to subject the prosecution's case to meaningful adversarial testing," the adversarial process itself becomes presumptively unreliable) **Cronic**, at 659. Also see **Blakenship v. Johnson**, 118 F.3d 312, 317 (5th Cir. 1997) (counsel's failure to argue on behalf of defendant at appellate hearing constituted denial of assistance of counsel).

Petitioner asserts, that the record on appeal was sufficiently developed for the Fifth Circuit's finding that he was denied effective assistance of counsel, where he was denied the right to testify in his own behalf. Petitioner's failure to take the stand and to testify in own behalf was not a voluntary waiver of his Fifth and Sixth Amendment guarantees and protections of the Constitution, and as provided for in Title 18 U.S.C. § 3481, and was contrary to the Fifth Circuit's decision in **Winters v. Cook**, 489 F.2d 174, 179 (5th Cir. 1973) (a criminal defendant's right to testify personally is "...such an inherently personal fundamental right that it can be waived only by the defendant and not his attorney.")

The Fifth Amendment in pertinent part states, "No person ... shall be compelled in any criminal case to be a

witness against himself, nor be deprived of life, liberty, or property without due process of law..." The Sixth Amendment in relevant part provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have assistance of counsel for his defense." The right to testify in a criminal trial is a basic right, and there is an obligation on the part of the trial court to assure that this right is available, and for trial counsel to make certain that the defendant knows of his right to testify, and to insure this right. Criminal defendants possess essentially two categories of constitutional rights; those which are waivable by defense counsel on defendant's behalf and those which are considered "fundamental" and personal to the defendant, which can be waived only by the defendant. Generally included in those matters in which counsel may waive on the defendant's behalf, are matters which primarily involve trial strategy and tactics. See **United States v. Mississippi**, 379 U.S. 443 (1965). Examples of fundamental decisions which only the defendant is empowered to waive are entry of a guilty plea, **Boykin v. Alabama**, 395 U.S. 238 (1969), waiver of a jury trial, **Adams v. United States**, ex rel. **McCann**, 317 U.S. 269 (1942), whether to pursue an appeal, **Fay v. Noia**, 372 U.S. 391 (1963), and whether to testify in his own behalf, see **McKaskle v. Wiggins**, 465 U.S. 168, 177 (1984), and **Rock v. Arkansas**, 483 U.S. 44, 107 S.Ct. 2704 (1987).

We proposition, that the Fifth Circuit Court of Appeals erred when it affirmed Petitioner's conviction and sentence, and where the record explicitly demonstrates that Petitioner was not afforded an opportunity to testify in his own behalf upon request to do so. See **McKaskle** and **Rock**, supra.

Petitioner contends, that he was denied the free exercise of his right to take the stand, because lead trial counsel failed to call him before the close of the case. Petitioner, unequivocally demanded that his trial counsel put him on the stand to, "tell his side of the story." A defendant, "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." See **Walder v. United States**, 347 U.S. 62 (1954). The fact that Petitioner was not permitted by lead trial counsel to take the stand in his trial was highly prejudicial to his case. The importance that the jury attaches to the accused when he does not take the stand and denies his guilt cannot be understated.

The failure of counsel to permit Petitioner to testify deprived him of a fair trial. Petitioner's counsel was ineffective and denied his (Petitioner's) Sixth Amendment right to testify in a complicated case in his own behalf. [1]

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[1] "...in 99% ... of all the criminal cases tried in the eighty-six judicial districts at the federal level, defendants who did not take the stand were convicted by juries ... the fact of the matter is that a defendant who does not take the stand does not in reality enjoy any longer the presumption of innocence." Williams, The Trial of a Criminal Case, 29 N.Y.S. Bar Bull. 36, 42 (1957). This observation apparently has been recently validated, as reported in The National Law Journal, 11/2/98, which found, "More than 40 percent of potential jurors polled say that a defendant who doesn't testify is hiding something, and three out four say that they might disregard a judge's instruction in favor of their own

Petitioner was unconstitutionally and by law deprived of his right to testify at his own trial. See Title 18 U.S.C. § 3481. Title 18 U.S.C. § 3481 provides in relevant part: "Competency of accused...In trial of all persons charged with the commission of offenses against the United States and all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

Numerous federal cases have implied that a defendant in a criminal trial may have a constitutional right to testify. See **Harris v. New York**, 401 U.S. 22 (1971) (every criminal defendant is privileged to testify in his own defense or to refuse to do so); **Brooks v. Tennessee**, 406 U.S. 605 (1972) ("whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right), and **Winters v. Cook**, 489 F.2d 174, 179 (5th Cir. 1973) (criminal defendants' right to testify personally is "such an inherently personal fundamental right that it can be waived only by the defendant and not his attorney." Also see **United States v. Bentvena**, 319 F.2d 916 (2nd Cir. 1963), cert. denied, sub nom., **Ormento v. United States**. 376 U.S. 940 (1963); **Faretta v. California**, 422 U.S. 806, 834 (1975), and **Wright v. Estelle**, 572 F.2d 1071, 1074 (5th Cir. 1978) (en banc) (Goodbold, J., dissenting).

Petitioner asserted to the district court and Fifth Circuit Court of Appeals, that his trial counsel knew prior

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judgment." Juror Outlook Survey, 1,012 adults surveyed by the National Law Journal and DecisionQuest.

to and during trial that he wanted to take the stand and testify in his own behalf and but for counsel's ineffectiveness in denying him the privilege, the jury convicted. Counsel's decision not to put Petitioner on the stand is indefensible.

Petitioner's lead trial counsel admitted that he was ineffective in a number of areas prior to and during trial sufficient enough to prejudice Petitioner, falling below an objective standard of reasonable representation, and but for his ineffective assistance Petitioner was convicted. See **Kyles v. Whitley**, 5 F.3d 806, 819 (5th Cir.), cert. granted 114 S.Ct. 1610 (1994).

Petitioner was deprived of due process in obtaining a fair trial, where counsel was admittedly ineffective, and denied Petitioner the right to testify during trial, in violation of his Sixth Amendment right to the Constitution. See **United States v. Teague**, 908 F.2d 752 (11th Cir. 1990) (the defendant's right to testify is fundamental and personal to the defendant, such that it may not be effectively waived by counsel against the defendant's will). Also see **United States ex rel Wilcox v. Johnson**, 555 F.2d 115, 118 (3rd Cir. 1977); **Rogers-Bey v. Lane**, 896 F.2d 279, 283 (7th Cir. 1990); **United States v. Bernloehr**, 833 F.2d 749, 751 (8th Cir. 1987), and **United States v. Martinez**, 883 F.2d 750, 756 (9th Cir. 1989). Additionally, it has been held that an accused right to present his own version of events in his own words is more fundamental to a personal defense than even the right of self-representation. See **Rock v. Arkansas**, supra. 107 at 2709.

In summary, and as previously discussed, Petitioner asserts, that he received ineffective assistance of counsel,

pursuant to the **Strickland** standard. Petitioner was prejudiced by ineffective assistance of counsel, and denied due process, depriving him of a fair trial, a trial whose result was unreliable. See **Lockhart v. Fretwell**, 113 S.Ct. 838 (1993). We argue, that the trial outcome would have been different, but for counsel's unprofessional errors. A reasonable probability existed that Petitioner would have been acquitted, had his attorney's performance been effective, and had his attorney allowed him to testify. See **Kimmelman v. Morrison**, 477 U.S. 365, 385 (1986), and **Bryant v. Scott**, 28 F.3d 1411, 1418 (5th Cir. 1994) (the court held counsel's failure to investigate alibi witness and other witnesses fell below the standard of reasonable competency). Harmon, Petitioner's trial counsel during an evidentiary hearing testified, that he signed an affidavit indicating that he was ineffective in representing Petitioner, where he did very little pre-trial investigation, failed to interview all witnesses, failed to call a certain defense witness, would not allow Petitioner to testify in his defense, that he should have requested the court to explain Petitioner's constitutional right to testify, and that he was not properly prepared for trial. Co-counsel testified, that in his opinion that he was effective in his representation of Petitioner as guaranteed by the *Seventh Amendment* (sic), and that he was a graduate of a law school in the Philippines. He was not aware that Petitioner wanted to testify, or that Petitioner and lead counsel discussed Petitioner's testifying in his own behalf. Co-counsel characterized his role on the defense team as a legal researcher, responsible for the development of various pleadings and motions.

Petitioner's lead counsel, during the evidentiary hearing on the ineffective assistance of counsel issue, prior to sentencing on direct testified that the affidavit filed by

him admitting his ineffective assistance was true and correct, and that he was ineffective where he believed; that his motion to dismiss would prevail, that he was not expecting to go trial, that he didn't prepare defense witnesses, that he didn't allow Petitioner to testify, and he should have asked the trial court to explain to Petitioner his right to testify or remain silent.

We present, that the Fifth Circuit Court of Appeals erred when it found that the the trial court was correct in its finding of fact, where the trial court held after a lengthy evidentiary hearing, that the testimony of Petitioner's lead trial counsel was not credible and accordingly was not given any weight as to the ineffective assistance claim. Further, that co-counsel's testimony was credible, and had Petitioner taken the stand and testified, that there would have been little or no effect on the outcome of the trial. We proposition, that the evidence in the case at bar clearly overcomes harmless error, where Petitioner was denied by his attorney the right to testify. **Chapman v. California**, 386 U.S. 18, 23 (1967). Petitioner asserts, that the right to testify is personal and when personal rights are involved, the harmless error rule should not have applied. See **Price v. Georgia**, 398 U.S. 323 (1970). In **Faretta**, supra., at 819, the Supreme Court referred to the right to testify in due process terms: This Court has often recognized the constitutional stature of rights that though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right ... to testify on his own behalf..." Also see **MacKenna v. Ellis**, 280 F.2d 592, 595 (5th Cir.), modified, 289 F.2d 928 (1961) (en banc). In **MacKenna**, the Fifth Circuit Court of Appeals held, that it was basic to due process, that an accused person have a fair opportunity to tell his story in a fair

trial. See **United States v. Walker**, 772 F.2d 1172, 1179 (5th Cir. 1985) ("Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance.") The right to testify may also be considered as included in the Sixth Amendment's guarantees of the defendant's right to meet and deny the accusation against him, **Walder**, supra., at 65, and his right to present witnesses on his behalf including himself. See **Washington v. Texas**, 388 U.S. 14 (1967), and **Parsons v. United States**, 404 F.2d 888 (5th Cir. 1968) (the denial by counsel of defendant's right to testify would nullify a conviction on collateral attack). There was no indication in the record, that Petitioner intended perjury in his desire to testify in his own behalf. Therefore, he had a constitutional right to testify, which could not be waived as a matter of trial strategy. See **United States v. Curtis**, 742 F.2d 1070, 1076 (7th Cir.) (per curiam), cert. denied, 475 U.S. (1986), and **Nix v. Whiteside**, 475 U.S. 157 (1986).

In summary, Petitioner propositions that his attorney's prohibition against him taking the stand in his own defense likely affected the outcome of the trial and rendered the trial fundamentally unfair and unreliable. See **Ferguson v. Georgia**, 365 U.S. 570, 582 (1961) (the defendant, "who above all others may be in a position to meet the prosecution's case."); **Green v. United States**, 365 U.S. 301 (1961) ("The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."); **Nichols v. Butler**, 953 F.2d 1550, 1553 (11th Cir. 1992) ("The testimony of a criminal defendant at his own trial is unique and inherently significant.") We assert, that Petitioner's attorney's deficient representation interfered with his

fundamental right to testify, and that depriving Petitioner his right to testify affected the reliability of the results, and warrants a new trial. See **United States v. Butts**, 630 F. Supp. 1145, 1149 (D. Me. 1986) ("...ineffective assistance of counsel which results in a deprivation of the defendant's right to testify transcends conventional Sixth Amendment analysis and...prejudice is sufficiently proven, if not to be presumed from, the resulting denial of the defendant's right to testify."), and **United States v. Moskovits**, 844 F. Supp. 202 (E.D. Penn. 1993). Petitioner propositions, that where he was denied by counsel and opportunity to testify in his own defense, that he in fact suffered from a structural defect. See **Arizona v. Fulminante**, 499 U.S. 279 (1991) (**Fulminante**, describes the distinction between "trial errors," which are subject to harmless-error review, and "structural defects," which are not). We present, that the value of a defendant's right to testify in his own behalf is a constitutional right, and therefore not subject to the harmless-error analysis, where the error affects the outcome of the trial. See **Brecht v. Abrahamson**, 507 U.S. 619 (1993) (structural defects "infect the entire trial process") **Fulminante**, 499 U.S. at 309.

We argue, that Petitioner's right to testify on his own behalf, and the Fifth Circuit's analysis of the importance of a defendant's testimony which was denied by trial counsel, clearly meets the standards of **Strickland**, in that his attorney's representation fell below an objective standard of reasonableness, and there is reasonable probability that except for the attorney's unprofessional errors, the result of the proceeding would have been different. See **United States v. Kinsey**, 917 F.2d 181, 183 (5th Cir. 1990) (citing **Strickland**). Additionally, the purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to

justify reliance on the outcome of the proceeding. Counsel's performance here was deficient, falling below an objective standard of reasonableness, contrary to the Fifth Circuit Court of Appeals' decision, where counsel's actions in not permitting Petitioner the opportunity to testify affected the very fairness of the trial process itself.

Accordingly, the deficiencies in counsel's performance was prejudicial to Petitioner's defense constituting ineffective assistance under the **Strickland**, standard, and we urge that this Honorable Court remand to the Fifth Circuit Court Appeals with appropriate instructions, based upon the arguments contained herein.

---------- ◆ ----------

## CONCLUSION

Petitioner hereby respectfully moves this Honorable Court to approve his application for certiorari.

This case presents serious due process issues concerning statutory considerations as well as this Honorable Court's prior decisions, with respect to a defendant's right to testify in his own behalf, and his right to effective assistance of counsel in trial.

Respectfully Submitted,

Cloud H. Miller, III
GA Bar 506508
52 Executive Park South
Suite 5203
Atlanta, GA 30329

App. 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-41053

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

COY LYNN OWENS

Defendant - Appellant

---

Appeal from the United States District Court for the Eastern District of Texas, Tyler

---

ON PETITION FOR REHEARING

Before POLITZ, Chief Judge, EMILIO M. GARZA and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG - 2

FILED

SEPTEMBER 30, 1998

App. 2

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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97-41053

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

COY LYNN OWENS,
Defendant-Appellant.

---

Appeal from the United States District Court
for the Eastern District of Texas, Tyler

(3:96-CR-1-1)

---

September 4, 1998

Before POLITZ, Chief Judge, EMILIO M. GARZA and STEWART, Circuit Judges.

PER CURIAM:

Coy Lynn Owens appeals his convictions and sentence. Having considered the record and the brief, and finding neither error nor abuse of discretion, the convictions and sentence are AFFIRMED.

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.
R. 47.54

App. 3

UNITED STATES DISTRICT COURT

Eastern District of Texas

United States of America

v.

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Coy Lynn Owens

Case Number 3:96CR00001-001

Joel Froneberger & Ronald Ferguson, Jr.
Defendant'sAttorney

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THE DEFENDANT:

( ) pleaded guilty to count(s)_____

( ) pleaded nolo contendere to count(s)_____

(x) was found guilty on count(s) 1-9

after a plea of not guilty

| Title & Section Number(s) | Nature of Offense | Date Offense Concluded | Count |
|---|---|---|---|
| 18 U.S.C. 371 | Conspiracy to commit Fraud by Mail | 01/07/1993 | 1 |

| | | |
|---|---|---|
| 18 U.S.C. 1341 | Fraud by Mail and | |
| 04/12/1991 | 2 | |
| 18 U.S.C. 2 | Aiding and Abetting | |
| 04/12/1991 | 2 | |
| 18 U.S.C. 1341 | Fraud by Mail and | |
| 05/08/1991 | 3 | |

See Additional Counts of Conviction-Sheet 1.01

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence imposed is pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s)_____

( ) Count(s) _____(is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 451-90-4589

08/18/1997

Defendant's Date of Birth: 02/01/1951

Date of Imposition of Judgment Defendant's USM No: 04702-078

Defendant's Residence Address

HCR 01, Box 157

Signature of Judicial Officer

Sulphur Springs TX 75482

App. 5

William Wayne Justice
Defendant's Mailing Address
United States District Court
HCR 01, BOX 157
Name and Title of Judicial Officer
Sulphur Springs TX 75482
August 18, 1997

DEFENDANT: COY LYNN OWENS
CASE NUMBER: 3:96CR00001-001

ADDITIONAL COUNTS OF CONVICTION

| Title & Section / Date Offense | Nature of Offense / Count Concluded | Number(s) |
|---|---|---|
| 18 U.S.C. 2<br>05/08/1991 | Aiding & Abetting<br>3 | |
| 18 U.S.C. 844(h)<br>04/18/1991 | Use of Fire to Commit a Felony<br>4 | |
| 18 U.S.C. 2<br>04/18/1991 | Aiding & Abetting<br>4 | |
| 18 U.S.C. 371<br>12/30/1993 | Conspiracy to Commit Fraud by Mail<br>5 | |
| 18 U.S.C. 1341<br>07/19/1991 | Fraud by Mail<br>6 | |
| 18 U.S.C. 2<br>07/19/1991 | Aiding & Abetting<br>6 | |
| 18 U.S.C. 1341<br>08/30/1991 | Fraud by Mail and<br>7 | |
| 18 U.S.C. 2<br>08/30/1991 | Aiding & Abetting<br>7 | |

| | | |
|---|---|---|
| 18 U.S.C. 1341<br>09/04/1991 | Fraud by Mail and | 8 |
| 18 U.S.C. 2<br>09/04/1991 | Aiding & Abetting | 8 |
| 18 U.S.C. 844(h)<br><br>08/02/1991 | Use of Fire to Commit A Felony | 9 |
| 18 U.S.C. 2<br>08/02/1991 | Aiding & Abetting | 9 |

Judgment Page 2 of 6

DEFENDANT: COY LYNN OWENS
CASE NUMBER: 3:96CR00001-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 210 month(s)
.

This term consists of 30 months as to each of counts 1,2,3,5,6, and 8, to be served concurrently, and consecutive terms of imprisonment of 60 months as to count 4 and 120 months as to count 9. The terms of imprisonment in counts 4 and 9 are to be served consecutively to the terms imposed in counts 1,2,3,5,6,7, and 8 to total 210 mos.

(x) The court makes the following recommendations to the Bureau of Prisons:

The court recommends that the defendant be confined in an institution as close to defendant's home as possible.

(x) The defendant is remanded to the custody of the United States Marshal.

( ) The defendant shall surrender to the United States Marshal for this district:
( ) at _____ a.m./p.m. on
_____.
( ) as notified by the United States Marshal.

( ) The defendant shall surrender for service of

sentence at the institution designated by the Bureau of Prisons.

( ) before 2 p.m. on _____

( ) as notified by the United States Marshal

( ) as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

_____

at _____, with certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

DEFENDANT: COY LYNN OWENS
CASE NUMBER: 3:96CR00001-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s).

This term consists of 3 years for each of counts 1,2,3,4,5,6,7,8, and 9, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For Offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

(x) The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

(x) The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable).

If this judgment imposes a fine or a restitution

obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

See Special Conditions of Supervision - Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five day of each month:
3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;

DEFENDANT: COY LYNN OWENS
CASE NUMBER: 3:96CR00001-001

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer:
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release. The defendant shall provide the probation officer with access to any requested financial information for

purposes of monitoring restitution payments. The defendant shall not incur new credit card charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

DEFENDANT: COY LYNN OWENS
CASE NUMBER: 3:96CR00001-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| Totals | $ 450.00 | | $ 169,271.96 |

( ) If applicable, restitution amount ordered pursuant to plea agreement. . . . $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g)..

( ) The court determined that the defendant does not have the ability to pay interest and it is ordered that:

( ) The interest requirement is waived.

( ) The interest requirement is modified as follows:

RESTITUTION

( ) The determination of restitution is deferred in a

case brought under Chapters 109A, 110, 110A and



113 A of Title 18 for offenses committed on or after 09/13/1994, until_____. An Amended Judgment in a Criminal Case will be entered after such determination.

(x The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

| Name of Payee | Amount of Loss | ** Total Amount of Restitution Ordered | Priority Order or Percentage of Payment |
|---|---|---|---|
| Farmer's Insurance Group of Companies | $95,772.32 | $95,772.32 | 56,580% |
| Prudential Insurance Company | $73,499.64 | $73,499.64 | 43.420% |
| Totals: | $ 169,271.96 | $ 169,271.96 | |

** Findings for the total amount of losses are required under Chapters 109A, 110, and 113 A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: COY LYNN OWENS
CASE NUMBER: 3:96CR00001-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution: (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A (x) in full immediately; or

B ( )$_____ immediately, balance due (in accordance with C, D, or E); or

C ( ) not later than_____; or

D ( ) in installments to commence_____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ( ) in _____(e.g. equal, weekly, monthly, quarterly) installments of $_____ over a period of _____ year(s) to commence_____ day(s) after the due date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalty payments are to be

made to the United States District Court, 211 West



Ferguson, Tyler TX 75702, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. No payments shall be required after the sum actually paid by all defendants has covered compensable injuries. Joint and Several is Farmer's Ins. Group.

(x) Joint and several

| Case Number (including Defendant Number) | Defendant Name | Joint and Several Amount |
|---|---|---|
| 6:83CR43(01) | Jerry Loudermilk | $95,772.32 |

( ) The defendant shall pay the cost of prosecution.

( ) The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington , DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States Attorney.

DEFENDANT: COY LYNN OWENS
CASE NUMBER: 3:96CR00001-001

STATEMENT OF REASONS

( x ) The court adopts the factual findings and guideline application in the presentence report.

OR

( ) The Court adopts the factual finds and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 19

Criminal History Category 1

Imprisonment Range: 30 to 37 months as to cts. 1-3 & 5-8; 60 mos as to count 4; and 120 mos as to ct 9 Supervised Release Range: 2 to 3 years

Fine Range: $ 6,000.00 to $ 60,000.00

(x) Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ 169,271.96

( ) Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

( ) For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 100, 110A and 113A of Title 18, restitution is not offered

because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or



some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

( ) Partial restitution is ordered for the following reasons(s):

(x) The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

( ) The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s);

OR

( ) The sentence departs from the guideline range:

( ) upon motion of the government, as a result of defendant's substantial assistance.

( ) for the following specific reasons(s):

A copy of this notice has been

distributed on this date to the following:

x Judicial Officer assigned to the case

x U.S. Attorney assigned to the case

x U.S. Probation Office